

# If You Are Going to Do It, then Do It Right: The Case for Videotaping Lethal Injections

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## I. INTRODUCTION

"If you're really in a quest for justice, you ought to be continually looking for superior ways of determining the truth."<sup>1</sup>

The *New York Times* calls it "one of the most secretive corners of the criminal justice system."<sup>2</sup> Glimpsed only through the accounts of a select few journalists and witnesses,<sup>3</sup> it is "shrouded in secrecy."<sup>4</sup> It is the struggle being waged behind closed doors.<sup>5</sup>

The secrecy in which lethal injections are conducted prevents the creation of an objective evidentiary record of what actually occurs in the execution chamber. Without such a record, courts are ill equipped to make informed decisions on whether a lethal injection protocol is constitutional or being followed.

It is well established that the death penalty is constitutional<sup>6</sup> and will be carried out in several states;<sup>7</sup> therefore, the next step is to ensure its proper administration.<sup>8</sup> This is primarily accomplished through litigation that seeks to

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<sup>1</sup> William Geller, a national expert on police practices and the author of a U.S. Department of Justice report on videotaping interrogations. Steve Mills & Michael Higgins, *Cops Urged to Tape Their Interrogations*, CHI. TRIB., Jan. 6, 2002, available at <http://www.chicagotribune.com/news/watchdog/chi0201060325jan06,0,3738783.story>.

<sup>2</sup> Erica Goode, *Video of a Lethal Injection Reopens Questions on the Privacy of Executions*, N.Y. TIMES, July 24, 2011, at A12.

<sup>3</sup> *Id.*

<sup>4</sup> Deborah Denno, *Should Executions Be Televised?*, ENCYCLOPEDIA BRITANNICA BLOG (Aug. 16, 2011), <http://britannica.com/blogs/2011/08/should-executions-be-televised/>.

<sup>5</sup> See Nathan Thornburgh, *Lethal Objection*, TIME MAG., Mar. 6, 2006, at 50, 50 (Feb. 27, 2006), available at <http://www.time.com/time/magazine/article/0,9171,1167754-1,00.html>.

<sup>6</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1522 (2008) (plurality opinion) (syllabus); *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

<sup>7</sup> *Baze*, 128 S. Ct. at 1526 ("A total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty . . ."); Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 264 (2009). There were forty-three lethal injections in 2011 and forty-six in 2010. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last updated Mar. 13, 2013).

<sup>8</sup> See *State v. Broom*, No. 96747, 2012 WL 504504, at \*2 (Ohio Ct. App. Feb. 16, 2012) (discussing the importance of abstaining from acting on personal concerns about the death penalty and focusing instead on upholding the Constitution regarding its application); see also *Rhoades v. Reinke*, 671 F.3d 856, 858 (9th Cir. 2011) (Eighth Amendment challenge to Idaho's three-drug lethal injection protocol); *Harbison v. Little*, 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007), *vacated on other grounds*, 571 F.3d 531 (6th Cir. 2009) ("[A]lthough lethal injection is the most prevalent form of execution, it is not sacrosanct . . .").

enforce the constitutionality of lethal injection procedures<sup>9</sup> and the State's adherence to those procedures.<sup>10</sup> The problem is that courts lack objective evidence to evaluate these claims. A visual evidentiary record is thus necessary to provide parties with *objective* evidence to use when bringing and defending these actions. This objective record can be created by videotaping executions.<sup>11</sup> Such a record will promote accuracy, fairness, and efficiency in legal proceedings, thereby increasing public trust in the justice system.

Although the Supreme Court and the other federal courts have not addressed the videotaping of lethal injections,<sup>12</sup> one state recently authorized the videotaping of an execution for the first time since 1992.<sup>13</sup> In July 2011, a Georgia Superior Court judge ordered that Andrew DeYoung's lethal injection be videotaped because of concerns over the State's lethal injection procedure.<sup>14</sup> The concerns were based on the problems that allegedly arose from the drug used during a Georgia execution in 2011, during which Roy Blankenship, the

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<sup>9</sup> See *Hill v. McDonough*, 547 U.S. 573, 581 (2006) (alleging that Florida's three-drug protocol violated the Eighth Amendment by being unnecessarily and gratuitously painful); *Dickens v. Brewer*, 631 F.3d 1139, 1141 (9th Cir. 2011) (holding that Arizona's lethal injection protocol did not violate the Eighth Amendment); *Chester v. Beard*, 657 F. Supp. 2d 534, 544 (M.D. Penn. 2009) (holding that inmates stated a claim that the State's death penalty protocol subjects them to an unnecessary risk of suffering pain); *Morales v. Tilton*, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006) (holding that California's protocol, as implemented, violated the Eighth Amendment).

<sup>10</sup> See *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012).

<sup>11</sup> Throughout this Note, the term "videotaping" means the process of visually recording an event with digital recording technology that is in color and includes sound. The terms "recording," "videotape," and "tape" refer to the tangible evidence that videotaping creates. The terms encompass any new digital recording technology that develops in the future.

<sup>12</sup> Although legal scholarship has devoted enormous amounts of time to the death penalty and lethal injection, the idea of videotaping lethal injections has only been mentioned sparingly on blogs. Legal scholarship has not yet seen an analysis of the idea: the justifications behind it, the costs and benefits, and what the procedure would entail. Indeed, no law review article has tackled the issue, and only one state court opinion discusses it. This Note addresses these questions. See Bruce Baley, *Videotaping Executions: Ethical Dilemma or Sensible Practice?*, CORRECTIONSONE.COM (Sept. 20, 2011), <http://www.correctionsone.com/ethics/articles/4379238-Videotaping-executions-Ethical-dilemma-or-sensible-practice/>; Douglas A. Berman, *Video of Lethal Injection Reopens Questions on Privacy of Executions*, SENT'G L. & POL'Y (July 24, 2011, 11:55 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/07/video-of-a-lethal-injection-reopens-questions-on-the-privacy-of-executions.html](http://sentencing.typepad.com/sentencing_law_and_policy/2011/07/video-of-a-lethal-injection-reopens-questions-on-the-privacy-of-executions.html).

<sup>13</sup> Eyder Peralta, *Georgia Set to Videotape Execution Tonight*, THE TWO WAY: BREAKING NEWS FROM NPR (July 21, 2011, 2:21 PM), <http://www.npr.org/blogs/thetwo-way/2011/07/21/138580920/georgia-set-to-videotape-execution-tonight>. The 1992 action involved taping the use of lethal gas as a method of execution. Damien Gayle, *Video Tape Execution Delayed as Prison Officers 'Figure Out' How to Film Lethal Injection*, MAILONLINE (July 21, 2011, 9:25 AM), <http://www.dailymail.co.uk/news/article-2017154/Video-tape-execution-delayed-prison-officers-figure-film-lethal-injection.html>.

<sup>14</sup> Goode, *supra* note 2.

inmate, was described by a medical expert as jerking, mumbling, and thrashing after the injection was administered.<sup>15</sup> In ordering the recording, the court did not find that any executions were “botched” but did find that there were “many facts relevant to the constitutionality of the State’s execution process that i[t] has refrained from disclosing to those who seek to challenge it.”<sup>16</sup> As demonstrated by this case and true for all others, without an objective record to document exactly what occurred during a lethal injection, courts are ill equipped to make informed decisions on whether a protocol is constitutional or being followed.<sup>17</sup> In the absence of any Supreme Court consideration of this problem, and as death row occupants increasingly challenge lethal injection procedures,<sup>18</sup> exploring the idea of videotaping the lethal injections is imperative.

This Note advocates videotaping lethal injections as a way to create an objective evidentiary record that litigants can use to challenge or defend the constitutionality of lethal injection procedures or the State’s failure to follow its constitutional procedures. Part II identifies the legal need for video evidence of lethal injections. Part III provides an overview of the benefits to both the inmates and the State that would result from videotaping executions. Part IV discusses the use of video evidence in the custodial interrogations context and why the justifications for and benefits of videotaping also apply to the lethal injection context. Finally, this Note proposes a model court Rule for federal and state courts to adopt to permit the videotaping of executions for use as evidence

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<sup>15</sup> Gayle, *supra* note 13. Lawyers for another Georgia death row inmate, Gregory Walker, argued that “recording DeYoung’s execution would provide critical evidence in his appeal about the effects of pentobarbital, which is the sedative now being used as the first step in Georgia’s injection procedure.” *Ga. Inmate Dies in Videotaped Lethal Injection*, USA TODAY, [http://usatoday30.usatoday.com/news/nation/2011-07-21-georgia-execution\\_n.htm](http://usatoday30.usatoday.com/news/nation/2011-07-21-georgia-execution_n.htm) (last updated July 21, 2011). The drug was used for the first time with Blankenship, and because of the reports of its effects on him, Walker requested a videotape to help show that the drug does not adequately sedate the inmate and could cause unnecessary pain and suffering, thereby rendering the procedure unconstitutional. *See* Peralta, *supra* note 13.

<sup>16</sup> Peralta, *supra* note 13. The Georgia Supreme Court upheld the order because of the Georgia Attorney General’s failure to follow proper procedure. *Id.*

<sup>17</sup> Fordham Law School professor Deborah Denno, whose scholarship includes a focus on lethal injections, opined that “[t]his development would help immensely in detecting the many problems with the lethal injection process, especially if the videotaping included all of the procedure from start to finish.” Greg Bluestein, *Georgia’s Videotaped Execution Sets New Precedent*, YAHOO! NEWS (July 22, 2011), <http://news.yahoo.com/georgias-videotaped-execution-sets-precedent-074735961.html>.

<sup>18</sup> For example, the constitutionality of California’s lethal injection procedure was challenged in 2006 in *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006), and ever since there has been a stay on executions in California that is not likely to be lifted before 2013. Valencia, Ippolito & Bowman, *Legal Challenges Delay California Executions Until 2013*, CAL. CRIM. DEF. BLOG (Dec. 30, 2011), [http://www.valenciaippolitobowman.com/blog/California\\_Criminal\\_Defense\\_Blog/post/Legal\\_Challenges\\_Delay\\_California\\_Executions\\_Until\\_2013/](http://www.valenciaippolitobowman.com/blog/California_Criminal_Defense_Blog/post/Legal_Challenges_Delay_California_Executions_Until_2013/).

in challenges to lethal injection procedures. The proposed Rule is found in the Appendix.

## II. THE LEGAL NECESSITY OF RECORDING LETHAL INJECTIONS

Death row inmates can challenge both the constitutionality of their state's lethal injection procedure<sup>19</sup>—most commonly an Eighth Amendment cruel and unusual punishment challenge—or the State's adherence to its lethal injection procedure.<sup>20</sup> When considering these challenges, the United States Supreme Court values objective evidence and signals to lower courts to do the same.<sup>21</sup> The problem is that inmates and the State lack the objective evidence necessary to bring or defend these actions, preventing judges from making accurate decisions. Without the objective evidence provided by video recordings, courts are (1) ill equipped to determine what constitutes a substantial risk of serious harm and thus violates the Eighth Amendment, and (2) forced to rely on the testimony of those carrying out the execution—and the few witnesses—to determine if the State is following its lethal injection protocol. An objective video record is thus necessary to allow litigants to effectively argue their cases and to allow courts to make meaningful decisions.<sup>22</sup>

The Supreme Court has explicitly stated that interpretation of the Eighth Amendment should be based on objective factors to the greatest extent possible.<sup>23</sup> The pertinent part of the Eighth Amendment states that cruel and

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<sup>19</sup> *Hill v. McDonough*, 547 U.S. 573, 576 (2006) (holding that petitioner was permitted to challenge the constitutionality of Florida's lethal injection protocol under 42 U.S.C. § 1983); *see also* *Berger*, *supra* note 7, at 260. Although the main constitutional challenge against lethal injection protocols is that they violate the Eighth Amendment's protection against cruel and unusual punishment, Fourteenth Amendment due process and equal protection challenges have also been brought. *See* *Towery v. Brewer*, No. 12-15381, 2012 WL 592749 (D. Ariz. Feb. 23, 2012) (inmate alleging that Arizona's lethal injection protocol violates Fourteenth Amendment due process rights to notice regarding the type of drugs and venous access to be used during the execution); *In re Ohio Execution Protocol Litig.*, 840 F. Supp. 2d 1044, 1049 (S.D. Ohio 2012) (arguing that Ohio's lethal injection protocol violates equal protection because it "codifies disparate treatment of similarly situated individuals without sufficient justification so as to be arbitrary, irrational, and capricious").

<sup>20</sup> *See* *Rhoades v. Reinke*, 671 F.3d 856, 862 (9th Cir. 2011).

<sup>21</sup> *See infra* Part III.A.2 for a discussion of *Scott v. Harris*, 550 U.S. 372 (2007).

<sup>22</sup> *See* *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012) ("Because the death penalty is undeniably the most serious penalty available to a State, the procedures for such penalty must be implemented in a reasoned, deliberate, and constitutional manner.").

<sup>23</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that a sentence of death for the crime of rape constitutes cruel and unusual punishment in violation of the Eighth Amendment, and observing that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent"); *see also* *Atkins v. Virginia*, 536 U.S. 304, 312, 321 (2002) (holding that execution of mentally retarded criminals constitutes cruel and unusual punishment in violation of the Eighth Amendment, and observing that "[p]roportionality review under those evolving standards should be informed by objective

unusual punishment shall not be inflicted.<sup>24</sup> In determining if a punishment is cruel and unusual, the Court looks to society's evolving standards of decency to determine if a punishment is excessive in relation to the crime.<sup>25</sup> In evaluating these standards of decency, the Court has "eschewed" subjective evidence and instead considers objective factors to the maximum possible extent.<sup>26</sup>

More specifically, in determining if a lethal injection procedure constitutes cruel and unusual punishment, the Court applies the standard articulated in *Baze v. Rees*.<sup>27</sup> In *Baze*, the Supreme Court held that to prevail on a claim that a state's lethal injection protocol violates the Eighth Amendment's protection against cruel and unusual punishment, the challenger must prove that (1) the protocol presents a substantial risk of serious harm or an objectively intolerable risk of harm, and (2) the State, without a legitimate penological justification, rejects an alternative method that is feasible and readily available and that would significantly reduce a substantial risk of severe pain.<sup>28</sup>

A product of the lack of a visual, objective evidentiary record, this standard is subjective, unclear, and difficult to apply, especially without video evidence.<sup>29</sup> Contrary to the Court's principle of evaluating Eighth Amendment

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factors to the maximum possible extent" (internal quotation marks omitted)); *Harmelin v. Michigan*, 501 U.S. 957, 1015 (1991) ("[We] . . . have focused not on the subjective views of individual Justices, but on objective factors to the maximum possible extent . . . ." (citation omitted) (internal quotation marks omitted)); *McCleskey v. Kemp*, 481 U.S. 279, 300, 308 (1987) (holding that Georgia's capital sentencing process did not violate the Eighth Amendment, and observing that "[i]n assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain objective indicia" (internal quotation marks omitted)); Katie Roth Heilman, *Contemplating "Cruel and Unusual": A Critical Analysis of Baze v. Rees in the Context of the Supreme Court's Eighth Amendment "Proportionality" Jurisprudence*, 58 AM. U. L. REV. 633, 660 (2009).

<sup>24</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

<sup>25</sup> *Atkins*, 536 U.S. at 312; *McCleskey*, 481 U.S. at 300; *Coker*, 433 U.S. at 592.

<sup>26</sup> These objective indicia include decisions of state legislatures and sentencing decisions of juries. *McCleskey*, 481 U.S. at 300. Only after objective evidence is considered will the Court then look to the subjective evidence. *Atkins*, 536 U.S. at 312.

<sup>27</sup> 553 U.S. 35, 50, 52 (2008) (plurality opinion) (holding that Kentucky's three-drug lethal injection protocol does not violate the Eighth Amendment's protection against cruel and unusual punishment).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 105 (Thomas, J., concurring) ("[W]e have left the States with nothing resembling a bright line rule."); Berger, *supra* note 7, at 279 ("[The rule] offers incomplete clarification."); Heilman, *supra* note 23, at 660–61 ("The Court's splintered ruling . . . creates uncertainty as to how the Court might resolve a hypothetical future challenge to another state's protocol in which there is more documented evidence on execution procedures . . . ."). In his concurrence in *Baze*, Justice Stevens opined that instead of ending the debate about the constitutionality of lethal injection, the *Baze* standard will only exacerbate the controversy and result in inconsistent rulings on the constitutionality of lethal injection procedures based on varying records—records that are more complete than the one from which the Court crafted its standard in *Baze*. *Baze*, 553 U.S. at 71 (Stevens, J., concurring).

challenges with objective evidence to the greatest possible extent, the *Baze* standard is unclear as to what a “substantial risk of serious harm” or an “objectively intolerable risk of harm” entails.<sup>30</sup> Obviously no one is available to testify as to what a lethal injection feels like and if and how much pain existed.<sup>31</sup> Judges thus rely primarily on relatively new scientific evidence<sup>32</sup> and subjective eyewitness testimony<sup>33</sup> when determining whether a lethal injection procedure is cruel and unusual. This is far from the objective evidence that the Court’s Eighth Amendment jurisprudence necessitates.

This Note does not explore the problems with the *Baze* standard<sup>34</sup> but rather argues that videotaping lethal injections will provide courts with better evidence to use when deciding if a state’s lethal injection protocol violates the Eighth Amendment’s protection against cruel and unusual punishment under the standard.<sup>35</sup> Because the standard is unclear as to what constitutes a constitutional violation and videotaping is a simple procedure that will provide objective evidence that will bring clarity, videotaping lethal injections should be mandatory.<sup>36</sup> Videotaping lethal injections will create an objective evidentiary record that will assist judges in understanding what a constitutional violation entails; that is, what constitutes a “substantial risk of serious harm” or “an

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<sup>30</sup> See Heilman, *supra* note 23, at 660. In fact, by the time *Baze* was decided, only one lethal injection had been administered in Kentucky, and thus the Court had little evidence on which to base its decision. *Id.* This makes *Baze* a poor test case and offers minimal insight on how courts should handle a case with more evidence regarding what occurs during the State’s lethal injections. *Id.*

<sup>31</sup> The one exception is Romell Broom, whose 2009 execution was halted after two hours of failed attempts to find a vein. Naimah Jabili-Nash, *Romell Broom Survived Ohio Execution Try, Ordered to Remain on Death Row*, CBS NEWS (Dec. 2, 2010, 3:58 PM), [http://www.cbsnews.com/8301-504083\\_162-20024577-504083.html](http://www.cbsnews.com/8301-504083_162-20024577-504083.html) (“Broom said he was struck with needles at least 18 times, with pain so excruciating he cried and screamed.”).

<sup>32</sup> The first lethal injection was conducted in Texas in 1982; thus, the scientific evidence surrounding it has existed for only thirty years. *Beardlee v. Woodford*, 395 F.3d 1064, 1073 (9th Cir. 2005).

<sup>33</sup> See *infra* notes 42–45 and accompanying text.

<sup>34</sup> Indeed, many law review articles have already tackled this issue. See Berger, *supra* note 7, at 264; Harvey Gee, *Eighth Amendment Challenges After Baze v. Rees: Lethal Injection, Civil Rights Lawsuits, and the Death Penalty*, 31 B.C. THIRD WORLD L.J. 217, 217 (2011); Heilman, *supra* note 23, at 647.

<sup>35</sup> This is similar to the argument for videotaping custodial interrogations: that objective evidence would “help clarify legal rules about coercion and voluntariness, allowing courts to provide greater guidance to police about the line between permissible and impermissible interrogation methods.” RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 294 (2008).

<sup>36</sup> If judges are able to watch the procedure as a whole on video instead of reading or hearing about it in parts through eyewitness testimony, and if judges have a developed record of lethal injections that have been administered over the years, they will be better equipped to clarify what sort of things would be a constitutional violation. This is exactly what happened in *Scott v. Harris*. See *infra* note 61 and accompanying text. When the Supreme Court saw the event (the car chase) on tape, it was better able to determine if the police officer’s actions violated the Fourth Amendment.

objectively intolerable risk of harm,” thereby improving courts’ ability to apply it.<sup>37</sup>

Additionally, litigants need video evidence to help prove or defend their cases in challenges not to the constitutionality of a lethal injection procedure, but to the State’s adherence to it.<sup>38</sup> This Note discusses how, just as in other contexts, objective video evidence, as opposed to subjective evidence such as eyewitness testimony, is desirable to establish what actually happened in the execution chamber and whether or not the State is indeed following its protocol.

A videotape of lethal injections is thus necessary to provide courts with the *objective* information necessary to ensure that a lethal injection protocol does not constitute cruel and unusual punishment and that the State is in fact following its procedure.

### III. JUSTIFICATIONS FOR VIDEO EVIDENCE

Videotaping executions will promote accuracy, fairness, and efficiency in our justice system as well as serve as a check on the government’s power. This section first discusses how videotaping executions will: (1) promote accuracy by creating an objective evidentiary record that promotes truth-finding; (2) promote fairness and check the government’s power by deterring misconduct by the State; and (3) promote efficiency by decreasing meritless claims against the State, thereby reducing overall litigation in our overcrowded courts. Finally, this section discusses videotaping custodial interrogations as an example of the benefits of videotaping.

#### A. Accuracy: Creates an Objective Record

Video evidence promotes accuracy by creating an objective record that assists fact-finders in ascertaining the truth, which is even more desirable in light of the unreliability of the alternate form of evidence: eyewitness

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<sup>37</sup> Professor Eric Berger notes that “there is no reliable data on how many inmates have suffered painful deaths. But as details about various states’ procedures emerge, it seems increasingly probable that some states’ procedures have caused and will continue to cause torturous pain.” Berger, *supra* note 7, at 266. It is thus essential that courts see and understand what types of procedures may pose such an intolerable risk of harm so that they may find them unconstitutional.

<sup>38</sup> For example, a federal public defender in Arizona sued the State for failing to follow its court-approved lethal injection procedures. Or. Justice Res. Ctr., *Execution Procedures: Arizona Not Following Rules*, DP9 BLOG (Dec. 6, 2011), <http://dp9blog.wordpress.com/2011/12/06/execution-procedures-arizona-not-following-rules/>; see *Court Gives Arizona Warning About Execution Protocol*, ARIZ. REPUBLIC, Feb. 28, 2012, <http://www.azcentral.com/arizonarepublic/local/articles/2012/02/28/20120228-arizona-moorman-execution-death-row-inmate-lawyers-look-stays.html> (“[A] federal appeals court panel . . . issued a strong warning to Arizona officials who have continuously violated and changed their own written protocol for executing state death-row inmates.”); see *Towery v. Brewer*, 672 F.3d 650, 655 (9th Cir. 2012) (providing the specific allegations).



testimony. The Supreme Court demonstrated its preference for objective video evidence over eyewitness testimony in *Scott v. Harris*.<sup>39</sup>

### 1. *In General: The Importance of an Objective Record*

Creating a complete, objective evidentiary record of lethal injections is essential to ensuring a fair trial and accurate judgment. The importance of having an objective evidentiary record in any context is self-evident.<sup>40</sup> The ideal fair trial would include a complete record that objectively depicted the events in dispute. Even though such evidence is not always available, our legal system encourages that we obtain and use objective evidence so long as it does not unfairly prejudice the parties.<sup>41</sup>

Creating an objective evidentiary record of videotaped lethal injections is especially desirable considering all of the well-known problems with eyewitness testimony. A continued reliance on the accounts of the select few who witness executions will result in an inaccurate or incomplete record.

The problem with eyewitness testimony lies in the fact that many people believe that a witness operates like a video camera.<sup>42</sup> For example, those who take this view envision the witness taking in a scene and storing the image on a videotape and then playing back an exact copy of the original scene in court.<sup>43</sup> The problem with this view is that human beings are not tape recorders and cannot objectively capture and replay the events they witnessed.<sup>44</sup> Human perception and memory are selective and constructive; neither one is a copying process that copies and replays information in its original form.<sup>45</sup> Whether it be a crime, an everyday occurrence, or a lethal injection, what an eyewitness sees and recounts is affected by several factors that render his testimony

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<sup>39</sup> See *infra* Part III.A.2.

<sup>40</sup> Law enforcement already routinely videotapes a variety of important procedures, including crime scenes, sobriety tests, undercover operations, and custodial interrogations, as doing so allows them to "collect, document, and process evidence more efficiently and effectively." LEO, *supra* note 35, at 300.

<sup>41</sup> For example, the Federal Rules of Evidence allow the admission of videotape evidence, as long as the probative value of the evidence is not outweighed by its unfair prejudice to the defendant, *see* FED. R. EVID. 403, and is not barred by any other special evidentiary rules.

<sup>42</sup> PETER B. AINSWORTH, *PSYCHOLOGY, LAW AND EYEWITNESS TESTIMONY* 7 (1998).

<sup>43</sup> *Id.*; Robert Buckhout, *Eyewitness Testimony*, 15 JURIMETRICS J. 171, 171 (1975) ("Both sides, and usually the witness too, succumb to the fallacy that everything was recorded and can be played back later through questioning.").

<sup>44</sup> AINSWORTH, *supra* note 42, at 10.

<sup>45</sup> *Id.* ("Humans do not simply record chunks of data which they encounter but rather sift it, interpret it subjectively, and then record that interpretation."). For an example of how perception causes one to actively interpret an image, see *id.* at 10–11.

subjective.<sup>46</sup> These factors make the witness an active observer rather than a passive perceiver and recorder, causing him to evaluate what he sees and reconstruct facts to reach conclusions.<sup>47</sup>

Furthermore, eyewitness testimony is an insufficient form of evidence in the lethal injection context because experiences, expectations, and attitudes all affect how one perceives an event, making it impossible to be completely objective when observing and recording events.<sup>48</sup> Moreover, lack of experience with a certain event may make processing it more difficult, and too much experience with a certain type of event may lead to overconfidence about what usually happens, both causing distortions in perception.<sup>49</sup> Human expectations also affect how we perceive events. Instead of viewing things objectively, "individuals tend to [perceive] what they expect to see and are inclined not to see what they do not expect to see."<sup>50</sup> By affecting perception and memory, attitudes and stereotypes can similarly bias the way an individual registers an event.<sup>51</sup>

For example, assume that D is charged with aggravated assault against V. The fight occurred right outside of a QuickMart. There is one impartial witness who watched the fight from beginning to end while waiting for the bus across the street. He will testify that he saw D throw the first punch. It is this witness' first time testifying in court but not his first time witnessing a robbery. He lives in a bad neighborhood where this sort of thing is commonplace. However, there also happened to be a QuickMart surveillance camera that captured the entire fight on tape. At trial, D claims self-defense, alleging that V hit him first.

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<sup>46</sup> Buckhout, *supra* note 43, at 172 ("[P]erception and memory are decision-making processes affected by the totality of a person's abilities, background, attitudes, motives and beliefs, by the environment and by the way his recollection is eventually tested.").

<sup>47</sup> *Id.*; see also AINSWORTH, *supra* note 42, at 10 ("Human perception should thus be thought of not as an objective, static and totally accurate process, but rather one that is active, creative and subjective."). Moreover, the witness may be motivated by a desire to be accurate, causing him to attach meaning to what he sees instead of just recording an objective account of the events. Buckhout, *supra* note 43, at 172.

<sup>48</sup> AINSWORTH, *supra* note 42, at 13. How an individual perceives things is largely based on how he is brought up. *Id.* For example, if a child's parents are afraid of the world, the child will tend to perceive the world as a dangerous place. *Id.*

<sup>49</sup> *Id.* at 14. For example, someone who has never before witnessed an armed robbery may misinterpret the events of the robbery, having little in his past to prepare him for such an occurrence. *Id.* Conversely, a police officer who has seen many armed robberies may reach an inappropriate conclusion when viewing the events because of the stereotypical views he has developed from all of his previous experiences with the crime. *Id.*

<sup>50</sup> *Id.* For a simple example of this phenomenon, see *id.* at 15.

<sup>51</sup> AINSWORTH, *supra* note 42, at 17. For example, in one study dealing with attitudes toward police actions during the British miners' strike in 1985, subjects were shown a picture of a police officer advancing towards a female with his baton raised and asked to later choose a drawing that was most like the picture. *Id.* Those who supported the police's actions during the strike picked drawings that depicted the police officer as less threatening, while those who were hostile to the police during the strike picked the drawings that depicted the officer as more threatening. *Id.*

Assuming that the videotape was obtained legally and no other rule of evidence would bar its admission, would any reasonable court deny admission of the videotape as evidence? Absolutely not. Having seen robberies before, the witness may believe or even expect that robbers always throw the first punch, and this belief may bias how he perceives the fight to have started. Or maybe the witness has never actually seen a robbery, but everyone in his neighborhood knows that robbers are ruthless and will do anything to escape capture, and thus he assumes the robber threw the first punch. Even though eyewitness testimony is available, the court will likely defer to the events as depicted by the videotape because courts value *objective* evidence—evidence not tainted by bias, perception, or memory issues.<sup>52</sup>

These faults of eyewitness testimony can be a significant issue when the testimony is relied on to create a record of lethal injections because the process is inherently captivated by emotion, bias, and expectations. For example, family members of the victim will be emotionally invested, members of the media will expect to witness certain phenomena, and government officials will be biased as to their political obligations and views on capital punishment. All of these factors will affect how they perceive the lethal injection.

Because of these known issues with the credibility of eyewitness testimony, videotaping executions is necessary to obtain objective evidence of what actually occurred in the chamber so that parties have the most accurate evidence during litigation.<sup>53</sup> In a high-stakes situation like the government taking someone's life in the name of society, the need for an objective record of that procedure is at its highest, as parties must use the record to effectively challenge and defend lethal injection protocols.<sup>54</sup> Eyewitnesses are not video cameras but rather artists painting a scene they see, making their own decisions about how to best depict that scene as they paint.<sup>55</sup> Instead of improperly relying on

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<sup>52</sup> Where it is available, and barring any other rules, courts will not ignore objective evidence and rely on subjective testimony. A prime example of this is *Scott v. Harris*, where the Supreme Court overturned a judgment based on a videotape that contradicted eyewitness testimony. 550 U.S. 372 (2007). *Scott* is detailed *infra* Part III.A.2.

<sup>53</sup> See Denno, *supra* note 4 (“[E]xecutions are witnessed by a select few, [and] viewers’ often constrained and conflicting accounts based on memory may provide only limited evidence of any sign of a constitutional violation . . .”).

<sup>54</sup> It is all the more surprising that such a high-stakes procedure is not already being videotaped when one considers how “inexpensive, ubiquitous, and readily available high-quality recording technology has become in recent years.” LEO, *supra* note 35, at 292.

<sup>55</sup> The process of perception is instead better analogized to an artist painting a picture. AINSWORTH, *supra* note 42, at 12. The artist uses his own interpretation of the scene to create a unique visual image on canvas. If ten artists painted the same scene, each would produce a different product. *Id.* They would all have some common themes, but “each one would have its own idiosyncrasies and subjective interpretations.” *Id.* Just as some artists might choose to highlight one particular aspect of the scene whilst others may almost ignore it, some witnesses may choose to highlight part of an event that resonated most with them and ignore those that had no personal importance. *Id.*

eyewitnesses to act as video cameras, *real* video cameras are needed to record and preserve the lethal injection.

## 2. *Scott v. Harris*

Although the Supreme Court has not specifically addressed the issue of videotaping lethal injections, it has demonstrated that it values objective video evidence over subjective eyewitness testimony when considering constitutional questions. In *Scott v. Harris*, the Court reversed the Eleventh Circuit's holding that a police officer violated the respondent's Fourth Amendment rights based on the fact that a videotape of the incident in question contradicted the facts as established by the circuit court.<sup>56</sup> The issue before the Supreme Court was whether the police officer, who struck the back of the respondent's vehicle with his own in order to terminate a car chase, acted reasonably such that he did not violate the respondent's Fourth Amendment right against unreasonable seizure.<sup>57</sup> To determine this, the Court needed to evaluate the car chase and consider "the risk of bodily harm that [the officer's] actions posed to respondent in light of the threat to the public that [the officer] was trying to eliminate."<sup>58</sup>

The court of appeals accepted the facts as asserted by the respondent: that the respondent remained in control of the car, slowed down for turns, did not run anyone off the road, and posed no threat to pedestrians in the parking lot.<sup>59</sup> These facts are what led the court of appeals to conclude that there was little, if any, threat to pedestrians and other drivers and that Scott's response was unreasonable and a violation of the Fourth Amendment.<sup>60</sup>

The Supreme Court reviewed the videotape of the events and found that it clearly contradicted the version of events presented by the respondent and adopted by the court of appeals.<sup>61</sup> The videotape showed that, in fact, the respondent's vehicle raced down narrow roads at high speed, swerved around other vehicles, forced other vehicles to move to the side to avoid being hit, and ran multiple red lights.<sup>62</sup> The tape made clear that the respondent posed an imminent threat to innocent lives, and thus the officer did not act unreasonably in hitting the respondent's car in order to terminate the chase.<sup>63</sup> The Court

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<sup>56</sup> 550 U.S. 372, 380–81 (2007).

<sup>57</sup> *Id.* at 381.

<sup>58</sup> *Id.* at 383.

<sup>59</sup> *Id.* at 379.

<sup>60</sup> *Id.* at 379–81.

<sup>61</sup> *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court stated that the facts accepted by the lower courts seemed to give the impression that the respondent was taking his driver's test rather than fleeing from the police. *Id.* at 378–79.

<sup>62</sup> *Id.* at 380 ("Far from being the cautious and controlled driver the lower court depicts, what [is shown] on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.").

<sup>63</sup> *Id.* at 384–85.

found that the “[r]espondent’s version of the events was so utterly discredited by the record that no reasonable jury could have believed him,” and the court of appeals should have adopted the facts as depicted by the videotape.<sup>64</sup>

This case demonstrates just how different eyewitness testimony can be from what actually occurred. The same exact event that was depicted on the videotape as dangerous was described by witnesses—and accepted by the courts—as safe. What the witnesses *perceived* the respondent’s driving to be did not match the character of the driving in reality.<sup>65</sup> The videotape was vital in proving what actually happened and vital in the Court’s analysis of any constitutional violations.

The Supreme Court’s reliance on the tape over eyewitness testimony demonstrates that the Court values objective video evidence over subjective eyewitness testimony.<sup>66</sup> If the Supreme Court turned to videotape evidence when faced with facts like those in *Scott*, it is not unreasonable to think that all courts would find videotape evidence useful whenever they try to ascertain what truly happened during an event in question, including lethal injections. Both car chases and lethal injections are intense, emotionally packed circumstances where several external factors could affect an eyewitness’ perception of the events. For example, the average individual who does not often witness a live car chase may be so excited by the situation that his or her excitement would affect what he or she actually sees happening. Similarly, a family member witnessing the lethal injection of the individual who murdered his or her loved one would likely be more focused on his or her emotions than on the procedure. Both scenarios illustrate situations in which objective videotape evidence is preferable to eyewitness testimony. Having recognized the importance of objective evidence in the car chase scenario, it is not unreasonable that courts would apply the same reasoning to justify the recording of lethal injections.

### B. Fairness: Deters Misconduct by the State

Videotaping lethal injections will promote fairness by deterring misconduct by the State. Misconduct does not refer to malicious violations but rather the failure to follow procedures, whether accidentally or negligently. Knowing that a visual record will be available to litigants and judges will incentivize those carrying out the execution to ensure that the procedure is administered correctly, as the availability of visual evidence increases the likelihood of proving liability.<sup>67</sup> For example, one of the safeguards in Kentucky’s protocol, which led the Court in *Baze* to determine that the protocol comported with the

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<sup>64</sup> *Id.* at 380–81. The judgment of the court of appeals was reversed and summary judgment was granted to the police officer. *Id.* at 386. The Supreme Court thought the videotape was so vital to the case that it attached it to its official opinion. *Id.* at 378 n.5.

<sup>65</sup> See *supra* notes 42–52 and accompanying text for a discussion of perception and its effect on eyewitness testimony.

<sup>66</sup> This does not suggest that the Court would not listen to both.

<sup>67</sup> This is explained further *infra* Part IV.B.

Eighth Amendment, was the requirement that the warden and deputy warden be present in the execution chamber with the prisoner to watch for signs of IV problems (consciousness checks) and that they order a new dose of the first drug administered if they determine that the inmate is not unconscious within sixty seconds.<sup>68</sup> Videotaping the protocol would incentivize the warden and deputy warden to comport with this requirement, helping to ensure that the procedure is executed correctly. This deterrent effect proved to be true in the context of videotaping custodial interrogations, supporting the expectation that videotaping will deter misconduct in the lethal injection context.<sup>69</sup>

### *C. Efficiency: Prevents Meritless Claims*

Videotaping lethal injections will promote efficiency by preventing death row occupants from bringing meritless claims against the State alleging constitutional violations or failure to follow proper procedure. Knowing that litigants and judges will have access to videotapes that clearly show the lethal injection and whether the procedure was followed will deter plaintiffs and their attorneys from wasting the courts' time and resources by bringing claims that they know the evidence will contradict.<sup>70</sup> This promotes efficiency by reducing the number of cases in our already overcrowded courts.<sup>71</sup> Custodial interrogations serve as an example of how videotaping a criminal procedure carried out by the State has prevented meritless claims.

### *D. Example: Custodial Interrogations*

Videotaping custodial interrogations is an example of how creating an objective evidentiary record of a criminal procedure conducted by the State benefits both defendants and the State.<sup>72</sup> Videotaping custodial interrogations is a common practice that is now legally mandated in jurisdictions around the United States. Over 500 jurisdictions require law enforcement to record confessions under certain circumstances, including seventeen states and the

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<sup>68</sup> *Baze v. Rees*, 553 U.S. 35, 55 (2008).

<sup>69</sup> Both are procedures carried out by the State as part of the criminal justice system. Both involve state agents acting opposite the defendant or suspect for the purpose of furthering the goals of the justice system—discovering the truth about a crime in custodial interrogations and punishing the individuals believed to have committed a crime by administering lethal injections.

<sup>70</sup> For an in depth discussion of this, see *infra* Part IV.C.

<sup>71</sup> MICH. S. JUDICIARY COMM., RECORDING INTERROGATIONS, S.B. 152: ANALYSIS AS REPORTED FROM COMMITTEE at 3 (2011) (“Fewer claims of police misconduct also can avoid time-consuming investigations and litigation, saving resources of both law enforcement agencies and courts.”).

<sup>72</sup> Despite the importance of such a record to parties, as well as to scholars, policymakers, criminal justice officials, and the public, little is known about the procedure because it is shrouded in secrecy, often intentionally. LEO, *supra* note 35, at 3. Videotaping has begun to change that.

District of Columbia.<sup>73</sup> In states where videotaping interrogations is not legally mandated, numerous police departments have voluntarily required some type of recording.<sup>74</sup>

Although law enforcement initially resisted the practice, many officials have now come to see the benefits.<sup>75</sup> Ninety-seven percent of police agencies that tried it found videotaping useful.<sup>76</sup> The practice has become widely accepted and even expected by jurors.<sup>77</sup>

Videotaping custodial interrogations has created an objective record that has significantly benefitted both defendants and the State.<sup>78</sup> The objective

<sup>73</sup> Alan M. Gershel, *A Review of the Law of Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 RICH. J.L. & TECH. 1, 3 (2010). These requirements have been imposed by legislatures, court decisions, amendments to state rules of evidence, or by court rules. *Id.* For example, Illinois' statute requires recording of custodial interrogations conducted in a detention facility. 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2009). Missouri's statute requires taping when the individual is suspected of committing certain serious offenses. MO. ANN. STAT. § 590.700 (West 2009). North Carolina's statute requires videotaping all custodial interrogations that relate to homicides. N.C. GEN. STAT. ANN. § 15A-211(d) (2009). Indiana's rule of evidence requires recording for all felonies. IND. R. EVID. 617. New Jersey's court rule requires recording in places of detention. N.J. C. R. 3:17.

<sup>74</sup> Thomas P. Sullivan, Andrew W. Vail & Howard W. Anderson III, *The Case for Recording Police Interrogations*, 34 LITIG. 30, 35 (2008).

<sup>75</sup> *Id.*; see also Robert J. Norris et al., "Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions, 74 ALB. L. REV. 1301, 1336 (2011) ("Although some law enforcement agencies have been resistant to recording interrogations, many have embraced the practice and have begun utilizing or experimenting with different recording policies."). For example, "Chicago police have been reluctant to videotape interrogations . . . . But their experience with taping confessions, officials have said, has turned out to be positive, and detectives now openly support the process." Mills and Higgins, *supra* note 1. The Chicago example comports with advocates' claims that "police departments that regularly tape interrogations report that the change was for the better." *Id.*

<sup>76</sup> Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 771 n.4 (2005) (citing WILLIAM A. GELLER, NAT'L INST. OF JUSTICE RESEARCH IN BRIEF, VIDEOTAPING INTERROGATIONS AND CONFESSIONS 10 (1993)). In fact, the first explicit call for recording interrogations came from police officers themselves. LEO, *supra* note 35, at 293.

<sup>77</sup> Gershel, *supra* note 73, at 1. "[S]ociety now recognizes it as a useful, if not necessary, tool for law enforcement," *id.*, and jurors have come to expect that confessions are recorded, *id.* at 2. For an example of a proposal by the Michigan legislature to mandate the videotaping of custodial interrogations and the arguments in support of it, see MICH. S. JUDICIARY COMM., RECORDING INTERROGATIONS, S.B. 152: ANALYSIS AS REPORTED FROM COMMITTEE (2011).

<sup>78</sup> See Ric Simmons, *Why 2007 Is Not Like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531, 566 (2007) ("[I]ntroducing a tape recorder . . . into the interrogation room can serve as an effective way of monitoring police conduct by deterring most abuses and detecting those that do occur."). The recording covers the entire interrogation, spanning from the advice of rights at the beginning to the end of the interrogation. Gershel, *supra* note 73, at 1.

record created by videotaping (1) helps fact-finders determine what really happened, (2) protects defendants' legal rights by deterring police misconduct, and (3) protects police officers against meritless claims of misconduct.<sup>79</sup>

### 1. *Accuracy: Creates an Objective Record*

Videotaping custodial interrogations promotes accuracy by creating an objective record that both parties can use at trial as evidence of what actually occurred.<sup>80</sup> Videotaping helps solve one of the main issues regarding custodial interrogation: solicitation of false confessions. Unlike depending on unreliable memory or incomplete written notes, videotapes capture and preserve everything that went on in the interview.<sup>81</sup> They capture reactions and nuances that testimony cannot possibly duplicate, including facial expressions, indicia of evasion or remorse, and honest responsiveness—all factors that help a fact-finder determine the truthfulness of a suspect's statements.<sup>82</sup> What the transcript of a suspect's confession indicates may be contradicted by what a videotape of that confession reveals.<sup>83</sup> Videotaping also helps with the issue of unconstitutional interrogation practices. Establishing what really happened in an interrogation room to determine if a violation occurred comes down to "a

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<sup>79</sup> Specifically, the defendant can use the videotape evidence to challenge the adequacy of *Miranda* warnings and the conduct of police officers, while the State can use the evidence to protect police officers from false claims of the same nature. See Gershel, *supra* note 73, at 1–2 (2010) (stating that videotaping has addressed concerns about the adequacy of the *Miranda* warnings, reduced lawsuits filed against police officers, enhanced investigations, reduced the number of suppression motions, strengthened prosecutors' cases, increased guilty pleas, and increased the public's confidence in the criminal justice system).

<sup>80</sup> Thurlow, *supra* note 76, at 807 (citing GELLER, *supra* note 76, at 6) (stating that videotaping interrogations provides for both exculpatory and incriminating evidence to be used at trial). The general inclination is that videotaping only helps defendants, but it can actually help prosecutors secure convictions. LEO, *supra* note 35, at 301. If a confession is obtained lawfully and recorded, it will likely be the most credible and convincing evidence of guilt that a prosecutor can then present at trial. *Id.*; FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 396 (4th ed. 2001) (stating that the confession is often "the linchpin of the prosecutor's case").

<sup>81</sup> It is "the most accurate and least intrusive way" to create an objective record of the events. Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 625 (2004); see also MICH. S. JUDICIARY COMM., RECORDING INTERROGATIONS, S.B. 152: ANALYSIS AS REPORTED FROM COMMITTEE (2011) (citing the State Bar of Michigan as supporting videotaping as "the best method of securing a precise and accurate record of custodial interrogations").

<sup>82</sup> Sullivan, *supra* note 74, at 34. These factors are especially important in determining the truthfulness of confessions.

<sup>83</sup> Thurlow, *supra* note 76, at 807 (2005) ("Even the emphasis a suspect places on different syllables in a phrase may convey a materially significant difference [as to whether or not his statement is honest].").



swearing match between the suspect's word and the officer's word."<sup>84</sup> Videotaping interrogations resolves the dispute of who said and did what during the interrogation, thereby eliminating these swearing matches.<sup>85</sup> Courts can simply play the tape and the judge can say, "It's right there!"<sup>86</sup>

Because the videotapes are objective and create a more accurate record of what occurred during the interrogation, "both judges and jurors [can] better assess the suspect and the interrogator."<sup>87</sup> For this reason, the Alaska Supreme Court held, in *Stephan v. State*, that the State's due process clause requires that interrogations that take place in detention be videotaped if feasible.<sup>88</sup> The videotapes constitute objective evidence that can be used to corroborate testimony about the interrogation.<sup>89</sup> Sometimes this accurate and objective record can be the only way for a defendant to effectively challenge misleading or false testimony.<sup>90</sup> Regardless of whether the content of the tape is more advantageous to the defendant or the State, the tape simply helps courts ascertain the truth.<sup>91</sup> Citing the reasons articulated in *Stephan*, the Minnesota Supreme Court followed Alaska in holding that "all custodial interrogation[s] including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."<sup>92</sup>

An objective video record also allows for after-the-fact review of the interrogation to discover and fix other problems. For example, detectives can watch the tapes to look for clues that they overlooked during the actual

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<sup>84</sup> Sullivan et al., *supra* note 74, at 34; see also *Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985); LEO, *supra* note 35, at 291 ("Not surprisingly, in the absence of an interrogation record, the parties will often dispute what occurred. The only way to resolve such disputes is to deem one of the versions of the facts more credible than the other—that is, to guess which side is more likely to telling the truth.").

<sup>85</sup> Lisa C. Oliver, *Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code*, 39 SUFFOLK U. L. REV. 263, 283 (2005).

<sup>86</sup> Sullivan et al., *supra* note 74, at 34.

<sup>87</sup> Thurlow, *supra* note 76, at 807.

<sup>88</sup> *Stephan*, 711 P.2d at 1159–60 ("[Videotaping custodial interrogations] is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial."). The United States Supreme Court has not addressed whether videotaping interrogations is required under the federal Due Process Clause.

<sup>89</sup> *Id.* at 1161.

<sup>90</sup> Drizin and Reich, *supra* note 81, at 628. Richard Leo even goes as far to say that recording is literally the only way to preserve exculpatory evidence and thus comply with due process. LEO, *supra* note 35, at 300. He specifically points to the State's burden of demonstrating that the suspect was properly given his *Miranda* warnings and knowingly waived them and posits that without a recording, there is no way to accurately determine if that happened. *Id.*

<sup>91</sup> *Stephan*, 711 P.2d at 1161; see also LEO, *supra* note 35, at 300 ("In some cases, the failure to record an interrogation will be tantamount to failure to preserve the most important evidence necessary to achieve a fair and accurate trial outcome.").

<sup>92</sup> *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

interrogation<sup>93</sup> as well as to evaluate their own techniques and train others.<sup>94</sup> Psychiatrists and psychologists for the parties can also watch the tapes for indicators of whether confessions are true or false.<sup>95</sup> In general, the videotape provides an objective record that can be used to ascertain the truth, benefiting both the parties involved and the justice system as a whole.

## 2. Fairness: Deters Misconduct by the State

Recording custodial interrogations promotes fairness by deterring improper and unconstitutional police conduct.<sup>96</sup> Knowing that their conduct will be available for review by the court and that evidence (and possibly their jobs) could be lost as a result of any improper conduct, officers have a greater incentive to play by the rules.<sup>97</sup> Officials are also more likely to prepare their strategies before an interrogation and be more conscious of their behavior during the interrogation, thereby decreasing the likelihood of violating constitutional standards or engaging in unprofessional practices.<sup>98</sup> The increased accountability created by the videotapes "protects the public's interest in honest and effective law enforcement,"<sup>99</sup> and increases public trust in our justice system.<sup>100</sup>

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<sup>93</sup> LEO, *supra* note 35, at 300.

<sup>94</sup> Sullivan, *supra* note 74, at 35.

<sup>95</sup> *Id.*; LEO, *supra* note 35, at 293 ("[E]liminat[ing] the secrecy of the interrogation process [will] . . . enable fact-finders to make more accurate assessments of the voluntariness and trustworthiness of confession evidence . . .").

<sup>96</sup> AMINA MEMON, ALDERT VRIJ & RAY BULL, *PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY* 82 (2d ed. 2003) ("[K]nowing that the interviews will be . . . videotaped might prevent police detectives from using oppressive tactics."); Sullivan, *supra* note 74, at 34 (A detective from a Michigan police department stated: "I think as the investigator, it keeps you in check knowing the video may be seen by a judge or jury.").

<sup>97</sup> The same has proved true for the installation of video cameras in police cars: "Cameras will serve the public and the police officers [and] . . . will remind both the public and officers they are being taped. [They] will put everyone on notice that you have to be at your best." Patrick McMahon, *Increased Clamor for Cameras in Cop Cars*, USA TODAY, July 18, 2002, <http://www.usatoday.com/news/nation/2002/07/19/copc cameras.htm>.

<sup>98</sup> LEO, *supra* note 35, at 302-03; *see also* State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994) ("A recording requirement also discourages unfair and psychologically coercive police tactics and thus results in more professional law enforcement.").

<sup>99</sup> Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985).

<sup>100</sup> Norris, *supra* note 75, at 1336; *see also* LEO, *supra* note 35, at 303 ("Electronic recording should improve relations between police and the public when an interrogation is controversial in a high-profile case. . . . Public trust of the police would also increase because the public would know that police are no longer scared to expose their actions." (internal quotation marks omitted)); Saul Kassin, *Videotape Police Interrogations*, BOSTON GLOBE, Apr. 26, 2004, at A13, *available at* [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2004/04/26/videotape\\_police\\_interrogations/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/04/26/videotape_police_interrogations/).

### 3. *Efficiency: Prevents Meritless Claims*

Recording custodial interrogations promotes efficiency by providing evidence that allows police officers to extinguish false or baseless allegations of abuse and police misconduct, frivolous appeals, and meritless claims.<sup>101</sup> The tapes create “a more accurate record of a defendant’s interrogation and thus will reduce the number of disputes over the validity of *Miranda* warnings and the voluntariness of purported waivers.”<sup>102</sup> If defendants know that the interrogation is recorded, they will be less likely to file claims that they know will be easily disproven by the recording. Specifically, a recording that spans the initial reading of the *Miranda* rights to the end of the interrogation “preclude[s] unfounded claims that the officers failed to give the warnings, refused requests for lawyers, engaged in physical or psychological abuse, or used other unlawful tactics to extract a confession.”<sup>103</sup> For example, a Florida police officer reported that the videotape of an interrogation he conducted allowed him “to refute allegations that he used a rubber hose on the defendant.”<sup>104</sup> The reduction in meritless claims accomplished by videotaping thus saves prosecutorial and judicial time, reduces costs, and promotes efficiency.<sup>105</sup>

Custodial interrogation is just one example of how videotaping promotes fact-finding, serves as a necessary check on government, and prevents meritless claims. The practice benefits the justice system as a whole and should be extended to lethal injections.

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<sup>101</sup> *Stephan*, 711 P.2d at 1161; LEO, *supra* note 35, at 297; Norris, *supra* note 75, at 1336; Thurlow, *supra* note 76, at 811; *see also* Drizin, *supra* note 81, at 625 (“[A] recording is integral for when a suspect . . . falsely claims he was subjected to police abuse.”).

<sup>102</sup> *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994) (citing *Stephan*, 711 P.2d at 1160–62); *see* MICH. S. JUDICIARY COMM., RECORDING INTERROGATIONS, S.B. 152: ANALYSIS AS REPORTED FROM COMMITTEE at 3–4 (2011) (“[R]ecording interrogations helps ensure that suspects receive the benefit of their *Miranda* rights, and provides independent evidence if police conduct was coercive or a statement was not voluntary. A recording also can be used to develop a defense or establish support for a false confession claim.”).

<sup>103</sup> Sullivan et al., *supra* note 74, at 34; *see also* LEO, *supra* note 35, at 297. The same has also proved true with the installation of video cameras in police cars. In addition to monitoring police behavior, they also discourage “bogus” complaints of police misconduct. McMahon, *supra* note 97.

<sup>104</sup> Sullivan et al., *supra* note 74, at 34. These allegations, if believed by the judge, would have resulted in suppression of the defendant’s confession and loss of the officer’s job. *Id.*

<sup>105</sup> MICH. S. JUDICIARY COMM., RECORDING INTERROGATIONS, S.B. 152: ANALYSIS AS REPORTED FROM COMMITTEE at 3 (2011) (“Fewer claims of police misconduct also can avoid time-consuming investigations and litigation, saving resources of both law enforcement agencies and courts.”); *see also* Sullivan, *supra* note 74, at 34–35.

#### IV. THE CASE FOR VIDEOTAPING LETHAL INJECTIONS: COMPARISON TO CUSTODIAL INTERROGATIONS

All of these justifications for and benefits that arise from videotaping custodial interrogations similarly support the videotaping of lethal injections.<sup>106</sup> Like an interrogation, a lethal injection is an important procedure carried out by the State as part of its criminal process.<sup>107</sup> The State has an obligation in both instances to ensure that the procedure does not violate the individual's constitutional rights.<sup>108</sup> The legitimacy of our justice system relies on the integrity of both procedures.<sup>109</sup> Our justice system cannot stand on values of fairness and accuracy if it coerces suspects into confessing to a crime that they did not commit or puts those same individuals to death in a manner inconsistent with a constitutional procedure.<sup>110</sup> For all of the aforementioned reasons, law enforcement agencies around the United States have recognized the necessity of ascertaining the truth of the events of an interrogation and just how vital the evidence is in litigation. The same reasoning—promoting accuracy, fairness, and efficiency—warrants the videotaping of lethal injections.<sup>111</sup>

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<sup>106</sup> Like custodial interrogations once were, lethal injections have been hidden behind “a veil of secrecy.” Andrew Cohen, *Why Lawyers and Judges Should Watch Executions*, ATLANTIC (July 26, 2011, 11:30 AM), <http://www.theatlantic.com/national/archive/2011/07/why-lawyers-and-judges-should-watch-executions/242496/>.

<sup>107</sup> Law professor and author Richard Leo wrote that “interrogation involves some of the most important governmental functions in any society: the investigation of crime, the apprehension of offenders, the restoration of order, and the deterrence of future crime.” LEO, *supra* note 35, at 1. Lethal injection involves the same important governmental functions, namely restoring order and deterring crime by eliminating the offender.

<sup>108</sup> The Fifth Amendment right against self-incrimination is primarily at stake in interrogations while the Eighth Amendment protection against cruel and unusual punishment is at stake in lethal injections.

<sup>109</sup> Secret and improper custodial interrogations can lead to “loss of public confidence in the accuracy and integrity of the criminal justice system, skeptical juries that refuse to convict, and even social protest.” LEO, *supra* note 35, at 3. Similarly, with cases such as that of Troy Davis that have put lethal injections back in the public eye, the lack of transparency can lead to a loss of public confidence in one of the government's most important functions. See Colleen Curry & Michael S. James, *Troy Davis Executed After Stay Denied by Supreme Court*, ABC NEWS (Sept. 21, 2011), <http://abcnews.go.com/US/troy-davis-executed-stay-denied-supreme-court/story?id=14571862>.

<sup>110</sup> Police interrogation and lethal injections “go to the heart of our conceptions of procedural fairness and substantive justice and raise questions about the kind of criminal justice system and society we wish to have.” LEO, *supra* note 35, at 1.

<sup>111</sup> Just as with custodial interrogations, the most fundamental problem with the legality of lethal injections is “not the failure of the . . . constitutional laws that set out to regulate it, but inadequate record-keeping and thus unreliable fact-finding.” *Id.* at 291. Thus, “mandatory videotaping of executions in the U.S. for limited viewing by relevant parties (judges, lawyers, etc.) is a good idea because it helps provide objective evidence of whether or not the execution violated the Eighth Amendment's prohibition against cruel and unusual punishment.” Denno, *supra* note 4.

### A. Accuracy: Creates an Objective Record

Videotaping lethal injections will promote accuracy by creating an objective evidentiary record that litigants can use to challenge or defend the constitutionality of or adherence to lethal injection procedures. Such a record is just as important to have in the lethal injection context as it is for custodial interrogations.<sup>112</sup> Videotaping is the most accurate and least intrusive way to obtain *objective* evidence of what occurred.<sup>113</sup>

Similar to how eyewitness testimony can be unreliable or incomplete in the interrogation context, eyewitness accounts of lethal injections can be just as problematic.<sup>114</sup> They may fail to recognize several things going on during the procedure, including things that they do not even know are important, or they may not witness the entire procedure.<sup>115</sup> A lethal injection is a very technical and emotionally charged procedure, a foreign procedure with which most individuals are not familiar.<sup>116</sup> These witnesses, who are relied upon to

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<sup>112</sup> Secrecy creates the risk of abuses, keeps the record incomplete and makes the rules difficult to apply, inhibits the development of clear rules, and contributes to public distrust. LEO, *supra* note 35, at 269.

<sup>113</sup> *Id.* at 291 (“Without a record, there is simply no way of objectively knowing what actually occurred . . .”).

<sup>114</sup> In granting the motion to videotape Mr. DeYoung’s lethal injection, Georgia Superior Court Judge Bensonetta Lane stated that:

[E]ye witnesses to an execution may often have varying recollections regarding the details of what happened. . . . [They have] not witnessed an execution performed by the State of Georgia and/or [are] unfamiliar with the protocols used. . . . [This] underscore[s] the potential relevance of the evidence the petition [for videotaping] seeks to gather.

Cohen, *supra* note 106.

<sup>115</sup> LEO, *supra* note 35, at 291 (“[A]t best, human memory is incomplete, selective, and prone to bias . . .”). Witnesses do not even always get to view the entire procedure. For example, of the fourteen states that specify what media witnesses are permitted to see, eight states allow the witnesses to begin viewing the process only after the execution team has inserted the intravenous catheters. Three states close the curtain after all of the chemicals are injected while the inmate actually dies and then reopen it after pronouncement of death. Connecticut closes the curtain before death and keeps it closed. Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 124 (2002). Recording the procedure is imperative to capturing what occurred during the parts of the lethal injections that witnesses cannot even witness; otherwise, the only evidence of what occurred is the testimony of the very same individuals whose actions are being challenged.

<sup>116</sup> For example, California permits up to fifty witnesses to witness a single execution. *Lethal Injection Procedures*, CAL. DEP’T OF CORRECTIONS & REHABILITATION, [http://www.cdcr.ca.gov/Reports\\_Research/Lethal\\_Injection.html](http://www.cdcr.ca.gov/Reports_Research/Lethal_Injection.html) (last visited Feb. 12, 2013). Among those who are qualified to witness are the warden, the attorney general, twelve reputable citizens, two physicians, five of the inmate’s family/friends if requested, two of the inmate’s spiritual advisors if requested, seventeen news media representatives, nine state-selected witnesses, and four staff escorts. *Id.* Each type of eyewitness has a certain bias or

document what happened during a lethal injection, cannot possibly see everything or even know what to look for, especially without extensive knowledge of what the procedure entails.<sup>117</sup> Even if they did know what to look for, their emotions may affect how they see it.<sup>118</sup> As discussed in Part III.A.1, their own biases and other individual factors will affect how they perceive the lethal injection.

Just as with interrogations, videotapes of lethal injections will help factfinders ascertain the truth.<sup>119</sup> A court would rather rely on a videotape of a suspect's confession than on a transcript so that it can view his demeanor when determining if a confession was coerced; the video offers a complete picture that eyewitness testimony lacks.<sup>120</sup> Similarly, videotaping lethal injections will provide a complete picture of the procedure, one that is much more objective than piecing together accounts of those who witnessed it.<sup>121</sup> Just as law enforcement seeks to avoid inaccuracies of witness testimony during interrogations by videotaping them, the State must videotape lethal injections to obtain an objective record of what actually occurred.

Similar to interrogations, a video recording of a lethal injection allows law enforcement and medical professionals to review the procedure to look for more clues to ascertain the truth.<sup>122</sup> Courts have only one chance to document a lethal injection and preserve it for review, but if they rely only on the recollection of those who administered it, or the eyewitness accounts of those who observed it,

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interest in the lethal injection—something to be considered when evaluating the importance of an objective video record.

<sup>117</sup> This is even truer if states do not designate individuals solely to observe and record for record-keeping purposes and rely instead on the observations of those who were there for other reasons if litigation should arise. *Cf.* Buckhout, *supra* note 43, at 171 (discussing the unreliability of witnesses during courtroom proceedings).

<sup>118</sup> *Id.* at 173.

<sup>119</sup> Cohen, *supra* note 106 ("Prison officials and prosecutors should no longer be allowed to keep secret from the courts vital evidence in the fight over lethal injections."). This is not to suggest that what is depicted on a video recording is not still open to interpretation and that experts on either side of the litigation could not disagree on what it shows; however, a recording does provide a more objective scene for experts to analyze than does eyewitness testimony.

<sup>120</sup> LEO, *supra* note 35, at 297 ("Taping creates an objective, comprehensive, and reviewable record of an interrogation, making it unnecessary to rely on the incomplete, selective, and potentially biased accounts of the disputants about what occurred.").

<sup>121</sup> Videotaping will also allow the individuals carrying out the procedure to devote their full attention to their tasks. One of the justifications for videotaping custodial interrogations is that detectives will no longer have to take notes and can instead focus on their interrogations strategy and conducting the most effective interrogation. *Id.* at 301. The same idea applies to videotaping lethal injections. Instead of having to worry about paying attention to what everyone else in the room is doing for fear that they might be asked about it during litigation, each individual can instead focus on his or her task at hand, assuring that he or she is performing it properly.

<sup>122</sup> LEO, *supra* note 35, at 293 (stating that an objective record will "furnish a foundation of dependable information" that professionals can consult).

they forgo the opportunity for meaningful review.<sup>123</sup> If a videotape were made, it would capture the whole picture and preserve it for examination as often as necessary.<sup>124</sup> Just as psychologists watch tapes of interrogations to assess the truthfulness of the confession, scientists and experts can assess tapes of lethal injections to determine if the patient reacted a certain way that would indicate that the drugs are not working or that something was administered incorrectly or not properly monitored.<sup>125</sup>

Furthermore, when the lethal injection is actually occurring, observers and the administrators have only those moments in which something occurs to register what happened and then perhaps record it or try to make sense of it. Consequentially, either they do not get a chance to determine what actually happened, or they try to make sense of what they think they saw, thereby injecting their own biases.<sup>126</sup> Videotaping will prevent this problem, just as it does in the interrogation context, by providing a visual record that can be reviewed.

Moreover, since lethal injection is still in its early stages,<sup>127</sup> new issues may arise with the science involved. The country is in a “period of experimentation (with involuntary human subjects) as it tries to find a suitable means of execution.”<sup>128</sup> As with all experiments, results and side effects are uncertain. New, unexpected problems may arise, and scientists and medical professionals may suddenly need to look for things they had not previously considered. A visual, evidentiary record would allow them to review the recording and explore new issues whenever they are discovered.<sup>129</sup> Similarly, just as an objective video record allows law enforcement to review interrogations to train officers

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<sup>123</sup> See MICH. S. JUDICIARY COMM., RECORDING INTERROGATIONS, S.B. 152: ANALYSIS AS REPORTED FROM COMMITTEE at 3 (2011) (“[The process of videotaping] is a powerful fact-finding tool that helps the criminal justice system reach the truth . . . . [It] provid[es] a reliable, impartial account of the session . . .”).

<sup>124</sup> It is “‘law enforcement’s version of instant replay’”; it creates a permanent and objective record for judges to review. LEO, *supra* note 35, at 297.

<sup>125</sup> For example, “The patient’s depth of anesthesia during surgery is typically assessed by a number of factors, including but not limited to the patient’s motor functions, responses to noxious stimuli, and reflexive responses.” HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 36 (2006), available at <http://www.hrw.org/sites/default/files/reports/us0406webwcover.pdf>. Videotape evidence would clearly show if the proper personnel were adequately monitoring the patient to see if he exhibited any of these signs.

<sup>126</sup> See *supra* notes 27–33 and accompanying text.

<sup>127</sup> The first lethal injection was conducted in Texas on December 7, 1982. See *Beardlee v. Woodford*, 395 F.3d 1064, 1073 (9th Cir. 2005).

<sup>128</sup> Cohen, *supra* note 106.

<sup>129</sup> This is similar to custodial interrogations, where “[r]ecording preserves the details of a suspect’s statement that may have initially been overlooked but subsequently became important.” LEO, *supra* note 35, at 300–01. Because the rule that I propose in this Note permits only attorneys involved in the lethal injection litigation and their experts to view the videotape, courts will need to consider the possibility of allowing other experts to view the tapes if and when it is needed to fix new, significant issues that may develop.

and improve their procedure,<sup>130</sup> an objective record will allow the State to review and improve its lethal injections. Just as with interrogations, recording lethal injections will promote accuracy by creating an objective video record that can depict what actually occurred during the procedure and can be reviewed for further investigation.

### *B. Fairness: Deters Misconduct by the State*

Just as recording custodial interrogations deters improper police conduct, videotaping lethal injections will promote fairness by deterring improper conduct by those administering the procedure and serve as a necessary check on the State.<sup>131</sup> Realistically, intentional improper conduct is not as big of a concern in lethal injections as it is in much more routine custodial interrogations.<sup>132</sup> However, because a lethal injection is such a high-stakes situation—the State is taking a life in the name of society—it warrants transparency.<sup>133</sup> If society imposes a check on the government when it merely questions possible suspects, would society not certainly want to impose a check on the government when it is taking a life in its name?<sup>134</sup> Discussing

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<sup>130</sup> LEO, *supra* note 35, at 301 (“[R]ecording assists in police interrogation training by allowing detectives and their superiors to analyze what worked and what did not in previous cases.”).

<sup>131</sup> If prison officials have nothing to hide, in other words, they should at least be willing to gather and hand over such videos for subsequent use by the courts, a simple matter of giving judges the “best evidence” available. Cohen, *supra* note 106. In regard to custodial interrogations, Sheriff Ken Jenne reasoned, “If you are not doing anything wrong, why aren’t you videotaping the process?” Thurlow, *supra* note 76, at 773 n.22. An objective record is not necessary because a police officer is more prone to dishonesty than others—“[r]ather, it is because we are entitled to assume that he is no less human—no less inclined to reconstruct and interpret past events in a light most favorable to himself—that we should not permit him to be a judge of his own cause.” LEO, *supra* note 35, at 269 (quoting Yale Kamisar) (internal quotation marks omitted).

<sup>132</sup> But the chance remains that “litigants may intentionally distort, understate, exaggerate, or misrepresent what transpired.” LEO, *supra* note 35, at 291.

<sup>133</sup> Denno, *supra* note 4 (“The videotaping of executions reflects courts’ growing awareness of the need for transparency in the execution process, much like other aspects of the criminal justice system (for example, cameras in the courtroom and public tours of prisons).”). Furthermore, just as constitutional law has failed to effectively regulate police interrogations in practice, LEO, *supra* note 35, at 291, the Eighth Amendment’s safeguard against cruel and unusual punishment and the Fourteenth Amendment’s Equal Protection Clause will provide no practical safeguards against unconstitutional or improper lethal injections if evidence is not available to enforce the rules.

<sup>134</sup> For example:

Prisons and state governments have been reluctant to explain why they are choosing certain new drugs, whether they have explored all alternatives, and whether they have consulted about the side effects of new drugs being used. Having an objective view of what actually happens in the execution chamber could provide some degree of transparency in evaluating the various procedures.



interrogations conducted in private, the Supreme Court has even stated that “[p]rivacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on.”<sup>135</sup> The gap in our knowledge as to what occurs during lethal injections can be easily remedied by videotaping.<sup>136</sup>

Very recent litigation over the constitutionality of Ohio’s death penalty procedure is an example of how an objective video record could have deterred a State’s repeated misconduct and avoided almost eight years of litigation. In *In re Ohio Execution Protocol Litigation*,<sup>137</sup> District Court Judge Gregory Frost wrote a very pointed opinion expressing his frustration with Ohio’s repeated failure to follow its lethal injection protocol and the almost eight years of litigation that plagued the court as a result.<sup>138</sup> In this case, Ohio again failed to

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Cohen, *supra* note 106.

<sup>135</sup> *Miranda v. Arizona*, 384 U.S. 436, 448 (1966) (discussing interrogation rooms and how interrogations take place in privacy).

<sup>136</sup> LEO, *supra* note 35, at 297 (“Recording removes secrecy from the interrogation process and eliminates the gap in our knowledge that the Supreme Court complained of more than four decades ago in the *Miranda* decision.”). It may be argued that the need for videotaping custodial interrogations can be distinguished from the need to videotape lethal injections because unlike in a lethal injection, what happened during an interrogation is almost always the suspect’s word against the police officer’s, while in the lethal injection context, those who carried out the execution and the observers can provide evidence as to what took place during the injection. There is greater room for dishonesty when there are only two people, who are both parties to the litigation, establishing what occurred than if a room full of observers were testifying. Thus, it can be argued that there is a greater need for videotaping interrogations than there is for lethal injections where there are several witnesses to attest to what happened, as the risk of dishonesty and incorrect facts is lower. This may be true; however, the State’s incentive to exaggerate or misrepresent the facts is arguably higher in the case of lethal injections than in custodial interrogations. Furthermore, witnesses of lethal injections watch from outside the chamber, away from the glass window into the execution room. They may not be able to see the specifics of the procedure, or even the entire procedure, *see* Denno, *supra* note 115, and certainly would not know the technical aspects of what the administrators inside are doing. While the defendant in the custodial interrogation context is at least available to tell his side of the story, there is no one to represent the inmate’s side in the lethal injection context. Worse than the defendant’s word against police officers’ in the custodial interrogation context, the State’s word is essentially *all* that is available in the lethal injection context.

<sup>137</sup> 840 F. Supp. 2d 1044 (S.D. Ohio 2012).

<sup>138</sup> *Id.* at 1046. The first sentence of Judge Frost’s opinion was, “This case is frustrating.” *Id.* (“Ohio has been in a dubious cycle of defending often indefensible conduct, subsequently reforming its protocol when called on that conduct, and then failing to follow through on its own reforms.”). Throughout the litigation, state actors occasionally lied to the court, and at other times were sincerely devoted to ensuring that lethal injections were conducted constitutionally. *Id.* The Ninth Circuit echoed Judge Frost’s frustration with the State’s inability to follow its procedures when warning Arizona about continuing to violate its protocol. Quoting Judge Frost’s opinion, the Ninth Circuit stated that “[u]nless permanent changes are made in the manner in which Arizona amends its protocols, Arizona’s ongoing conduct may require us ‘to monitor every execution on an ad hoc basis, because the State cannot be trusted to fulfill its otherwise lawful duty to execute inmates sentenced to death.’”

follow various aspects of its protocol, “unnecessarily and inexplicably creat[ing] easily avoidable problems [and forcing the] Court to once again stay an execution.”<sup>139</sup> This frustrated the court because Judge Frost did not want to micro-manage executions.<sup>140</sup> If the State knew that its execution process would be videotaped, perhaps it would not have continued to ignore its procedure.

Finally, the transparency created by videotaping will increase the legitimacy of lethal injections by increasing public trust in our justice system.<sup>141</sup> Just as videotaping interrogations deters police misconduct, improves the quality of interrogations, and lends greater credibility to the process and the officers that participate in it,<sup>142</sup> videotapes will eliminate secrecy from lethal injections. Greater transparency will increase public perception of the legitimacy of the execution process and our justice system more generally.<sup>143</sup> While videotaping interrogations “protect[s] the integrity of the case,”<sup>144</sup> videotaping executions protects the integrity of the procedure, as well as of the inmate who has a right to be executed in a constitutional manner.

### C. Efficiency: Prevents Meritless Claims

Just as recording custodial interrogations provides evidence for officers to use to negate meritless claims of police misconduct, videotaping lethal injections will promote efficiency by permitting the State to easily refute frivolous allegations of constitutional or procedural violations. The creation of an objective record will reduce litigation used solely to stall executions, as inmates will likely not bring a challenge if they know that the videotape will show proper adherence to the procedure.<sup>145</sup> It is easier for both sides to assert

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Towery v. Brewer, 677 F.3d 650, 653 (9th Cir. 2012) (quoting *In re Ohio Execution Protocol Litig.*, 671 F.3d 601, 602 (6th Cir. 2012)).

<sup>139</sup> *In re Ohio Execution Protocol Litig.*, 840 F. Supp. 2d at 1046.

<sup>140</sup> *Id.* (“This is frustrating to the Court because no judge is a micro-manager of executions and no judge wants to find himself mired in ongoing litigation in which he must continually babysit the parties.”). Judge Frost’s frustration is also apparent in his exclamation that “if *Ohio* would only do what it says it will do, everyone involved in this case can finally move on.” *Id.*

<sup>141</sup> “Even though executions have become increasingly hidden from the public, and therefore more politically palatable, they have not become more humane, only more difficult to monitor.” Denno, *supra* note 115, at 64.

<sup>142</sup> LEO, *supra* note 35, at 302.

<sup>143</sup> *Id.* at 303; see *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“[Courts] need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.”).

<sup>144</sup> Mills and Higgins, *supra* note 1.

<sup>145</sup> This is true for all of the same reasons articulated in the custodial interrogation context. See *supra* Part III.D.3. A notable caveat is that death row inmates who are about to exhaust their appeal options may bring any meritorious claim simply to delay execution and thus will bring allegations of procedural or constitutional violations regardless of what a recording may show.

that which is not completely true when there is no visual evidence.<sup>146</sup> But when there is a tape available to which a judge can point, litigation becomes more accurate and efficient.<sup>147</sup> And just as law enforcement came to appreciate the benefits of videotaping interrogations, so too will states realize all of the benefits that videotaping lethal injections brings.<sup>148</sup>

In sum, videotaping lethal injections will result in the same benefits that arise from videotaping custodial interrogation; it is a win-win situation that will protect the State and the inmate, help wardens' counsel and defense attorneys assess their cases, promote accurate fact-finding and decision-making at trial, and increase the public's trust in the justice system.<sup>149</sup>

## V. SOLUTION: MODEL COURT RULE

This Note proposes a court rule that mandates the videotaping of lethal injections.<sup>150</sup> The only purpose of the recordings is to serve as evidence in litigation challenging the constitutionality of a state's lethal injection protocol or a state's failure to follow its protocol.<sup>151</sup> The main issue with allowing the videotaping of lethal injections is, of course, compromising the privacy of the inmate.<sup>152</sup> All aspects of this proposed court rule address this concern, and

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<sup>146</sup> This is simply common sense. It is easier to exaggerate or alter the facts of an event if there is no record to show otherwise.

<sup>147</sup> Just as with custodial interrogations, "[i]t saves money by reducing the time that [the parties and judges] must spend reconstructing, testifying about, or evaluating" what actually happened. LEO, *supra* note 35, at 302.

<sup>148</sup> Many experienced officers who were interviewed about videotaping interrogations said that they "would not consider returning to non-recorded sessions" and were surprised when told that most police officers do not record custodial interrogations in serious felony investigations. *Id.* at 296. I posit that the same will be true when states begin videotaping lethal injections and the State sees the inevitable reduction in challenges to its lethal injection procedures. Challenges might increase when litigants first know that videotapes are available; however the solution suggested in Part V prevents litigants from requesting videotapes to search for a violation when they have no basis to believe one exists.

<sup>149</sup> Saul Kassir, Op-Ed., *Videotape Police Interrogations*, BOS. GLOBE, Apr. 26, 2004, at A13.

<sup>150</sup> Realistically, state legislatures cannot be expected to promulgate legislation requiring the videotaping of all executions, as legislatures have traditionally been extremely reluctant to get involved. Berger, *supra* note 7, at 301 ("[M]any states have given little to no consideration to the method by which they carry out their most solemn duty. To the contrary, many states have haphazardly slapped together a procedure, blindly following other states, who themselves failed to give real thought to it in the first place.").

<sup>151</sup> The evidence will aid in the resolution of factual disputes and help provide clear rules that must be followed in order for lethal injections to be conducted constitutionally and properly. LEO, *supra* note 35, at 294.

<sup>152</sup> Aside from protecting the confidentiality of the execution team members, which can be accomplished by court order, this is the only valid reason the State would have not to videotape lethal injections. Again, as Sheriff Ken Jenne reasoned, "If you are not doing anything wrong, why aren't you videotaping the process?" Thurlow, *supra* note 76, at 773 n.22.

many aspects of the rule are based on standards already employed in other areas of the legal system. The rule allows for the creation of an objective evidentiary record while protecting the inmate's privacy. In order to do this, the rule imposes strict regulations concerning things such as: (1) the process of videotaping; (2) the procedure for obtaining a tape to use as evidence; and (3) who will be permitted to view the tape. Concerns regarding the rule are addressed in Part D, and the language of the proposed rule is found in the Appendix.

### A. *The Process of Videotaping*

The process of videotaping the lethal injection must promote privacy whilst obtaining a fair and objective recording. Even though the rule mandates the videotaping of all lethal injections, the judge must not allow videotaping of a certain lethal injection if the inmate being executed does not wish to be taped. Judges must obtain the knowing and voluntary consent of the person being executed before allowing the party requesting the videotape to record it.<sup>153</sup> This consent must be given orally, in court, before the judge, and the inmate must also give and sign his written permission in front of the judge.<sup>154</sup> The inmate must also be informed of the purpose behind the recording and who will be permitted to view it.<sup>155</sup> He is permitted to change his mind at any time prior to the recording. Although changing one's mind at the last minute would undoubtedly affect the party's case, it is still his execution and he should be permitted to decide if it can be recorded.<sup>156</sup>

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<sup>153</sup> This is akin to the standard for determining if a suspect waived his *Miranda* rights before a custodial interrogation. To determine if the waiver was valid, the Court applies the totality of the circumstances test to determine whether the accused "knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (citing *Miranda v. Arizona*, 384 U.S. 436, 475-77 (1966)). The same standard should be applied in this context.

<sup>154</sup> The standard for determining that the inmate's permission to be videotaped is given knowingly and voluntarily should be the standard used when a defendant waives his constitutional rights. Specifically, this is akin to ensuring the validity of a defendant's guilty plea (his waiver of a right to a trial). For a guilty plea to be valid, it must be knowing and voluntary. To constitute "knowing," the defendant must know the procedural rights he is waiving, the nature of the charges against him, and the direct penal consequences of the plea; to be "voluntary," the plea must be given free of coercion. FED. R. CRIM. P. 11.

<sup>155</sup> This is akin to the requirement of informed consent in medical malpractice cases. A patient may establish a doctor's violation of informed consent by proving a failure to disclose a material risk that a reasonable patient would have considered important to know before undergoing treatment, and that if the patient had known of this risk, he would not have undergone the treatment. *See, e.g., Matthies v. Mastromonaco*, 160 N.J. 26 (N.J. 1999). Similarly, an inmate agreeing to have his lethal injection videotaped must know the risk to his privacy in the form of who will view the recording and decide if he consents.

<sup>156</sup> In this case, the inmate's privacy should be paramount to the interests of the litigants in obtaining the recording. The necessity of creating an objective record must be balanced against the inmate's privacy interest.

The recording must be conducted by one court-appointed, impartial cameraperson, accompanied by a law enforcement official who will ensure that no tampering occurs. This cameraperson should have the proper qualifications, expertise, and technical experience and be trained on how to videotape the lethal injection (i.e., from what angle it should be recorded and how the equipment will be used around the execution chamber). Additionally, each court should use the same one or two camerapersons for each lethal injection in order to ensure consistency. The cameraperson should be present at the execution the entire time and test the equipment on the day of the execution.<sup>157</sup>

The tape should begin right before anyone enters the execution chamber for the first time, including when personnel enter without the inmates to make any preparations, and continue until the deceased's body is removed from the chamber.<sup>158</sup> Videotaping the entire process is essential to ensuring that no violations occur at any time and will also help determine if there is a nexus between an action at the beginning of the procedure and a reaction by the inmate later in the procedure. The cameraperson and law enforcement official must deliver the tape to the court immediately following the taping to prevent tampering. This entire procedure must be consistent in every instance that videotaping is allowed in order to ensure fairness.

### *B. Procedure for Obtaining the Tape*

The procedure by which litigants must request to view the videotape for evidentiary use must protect the inmate's privacy. The party that wishes to view the videotape and use it as evidence must request the tape by motion.<sup>159</sup> In the motion, the party must allege facts sufficient to suggest a reasonable possibility that the videotape will show a violation that he or she seeks to prove. This standard will ensure that access to the tapes is permitted only when necessary and will prevent litigants from requesting a tape to search for possible evidence without a sound basis for believing there is something to find. Finally, if a videotape can be obtained, it is not required to automatically replace any other type of evidence such as eyewitness testimony; it can corroborate (or contradict) that testimony.<sup>160</sup>

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<sup>157</sup> As with all videotaping, there is the risk that the equipment will malfunction. It must be at the discretion of the court to decide if resources permit that a backup recorder be provided.

<sup>158</sup> See Denno, *supra* note 4 ("[T]he videotape must show *all* of the execution process . . . . [I]t should capture . . . every aspect of the procedure, from the mixing of the drugs to the details of intravenous insertion to any tests instituted to determine if the inmate is consciously aware, to the point at which death is declared."). This is similar to the requirement of videotaping the entire custodial interrogation in certain jurisdictions. See Gershel, *supra* note 73, at 1–3.

<sup>159</sup> The motion can be made at any time pre-trial or during the trial—whenever the evidence becomes necessary to obtain. If one party views the tape, the other party should be permitted to do so as well.

<sup>160</sup> *Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985).

### *C. Individuals Permitted to View the Recordings*

The decision regarding who will be permitted to view the tapes must protect the inmate's privacy. The tapes may only be viewed by the defense attorneys, the inmate, the State's attorneys, the judge, and expert witnesses who must analyze and testify about the tape's contents.<sup>161</sup> These individuals may only view the tape in court in the presence of a law enforcement official to prevent any tampering or duplicating; the tape may never leave the court. Judges should prohibit any copies from being made. All those who view the tape, including the law enforcement official, must sign a confidentiality document asserting that they will not make a copy of the tape, discuss the tape with anyone other than those who have been permitted to view it, or modify the tape in any way.<sup>162</sup> Upon conclusion of the trial, the tape should be sealed by the court and forbidden to be seen by anyone unless a motion that meets the necessity standard is filed in subsequent litigation challenging lethal injection procedures.<sup>163</sup> All of these requirements protect the privacy of the individual being executed whilst allowing for collection of the information necessary to create an objective record.

### *D. Concerns Addressed*

Opponents of a rule that mandates the videotaping of lethal injections may argue that tapes will inevitably be leaked to the public,<sup>164</sup> and eventually, the general public will be watching executions on YouTube.<sup>165</sup> While this concern is valid, the likelihood of a recording being leaked to the public is very slim due to the procedural safeguards mandated by the rule to address this very concern. At no point is the recording ever in the hands of just one person; it is always under the watch of at least two people. When the recording is being made, the individual conducting the recording is in the presence of a law enforcement official, those conducting the lethal injection, and any other witnesses. When

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<sup>161</sup> All of these parties will benefit from the fact that the tapes will prove accurate fact-finding and more informed decision making. LEO, *supra* note 35, at 297.

<sup>162</sup> States should be at liberty to decide the consequences for violating this confidentiality agreement. Given the delicate nature of the information being protected and the extent to which it compromises the inmate's privacy if released, I suggest criminal consequences.

<sup>163</sup> When Judge Lane ordered the videotaping of the lethal injection in Georgia, she indicated that the taping should not interfere with the execution, should not identify those carrying out the procedure, and should be sealed immediately and given to the court. Peralta, *supra* note 13.

<sup>164</sup> Denno, *supra* note 4.

<sup>165</sup> Goode, *supra* note 2 ("[I]t is inevitable, many experts believe, that some of those recordings will make their way onto television or even YouTube, with or without the blessings of a court."); see also Cohen, *supra* note 106. Some concerns with this are that the public would "be either horrified by what they were seeing or disappointed it was not worse or eventually immune to the prospect of executions altogether." Denno, *supra* note 4.

the recording is transferred immediately after the conclusion of the execution, both the law enforcement official and the individual who recorded the procedure must transfer the recording to the court. When the parties view the recording, they do so in the presence of a law enforcement official and are not permitted to duplicate the recording or take it out of the room in the courthouse where it is being viewed. Essentially, for the tape to be leaked, both the law enforcement official and the individual conducting the recording would have to conspire to leak the tape, since at almost any point in time when the recording is not sealed by the court, it would be in the presence of both of them (and when it is not, it is in the presence of the law enforcement official and the parties viewing it). The rule's procedural safeguards thus make it highly unlikely that a recording would become public.

Of course it cannot be said with complete certainty that a recording will never be leaked; that is always a possibility. However, that is true of any regulation.<sup>166</sup> There is always the possibility that something will go wrong, but as long as proper regulations are in place, that risk is one that is worth taking.<sup>167</sup> In this context, the benefit of creating an objective record of lethal injections outweighs the possibility that one tape might be illegally leaked.<sup>168</sup> Surely the possibility of confidential information being leaked does not stop the CIA from obtaining it. The same rationale applies in this context: the probative value of the information substantially outweighs the minimal chance that a recording will be leaked.

Opponents may also argue that videotaping compromises the privacy that is necessary in such a delicate situation, thereby compromising the inmate's dignity in his death. However, my proposed rule addresses this concern. It requires that judges obtain the inmate's knowing and voluntary consent before videotaping, and the tapes are only permitted to be seen by a select few for only specific reasons. "Secrecy is not the same as . . . privacy."<sup>169</sup> While privacy concerns prevent an execution from becoming a public spectacle, secrecy prevents an execution from legal scrutiny. Privacy protects an inmate's rights, while secrecy creates a forum for them to be infringed upon.

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<sup>166</sup> Cohen, *supra* note 106 ("Every day in this country, judges deal with confidential . . . evidence which is sealed and . . . never sees the light of day. To think that the handful of judges and lawyers who would have access to the tape would allow it to be published is a[n] insult to them and their staffs."); Denno, *supra* note 4 ("Some have argued against videotaping because the tapes could be leaked to the general public; yet this is a risk with any kind of confidential legal information . . .").

<sup>167</sup> Cohen, *supra* note 106 ("A known benefit (judicial access to the tapes) should give way to a theoretical possibility (the leaking of a tape). Even in the cynical world of capital punishment law, this is a bad argument.")

<sup>168</sup> LEO, *supra* note 35, at 291 ("[W]ithout a factual record . . . there is no way to ensure that the three goals of the adversary system (protecting legal rights, checking state power, and promoting truth-finding) are achieved . . .").

<sup>169</sup> LEO, *supra* note 35, at 269 (quoting Bernard Weisberg).

Cost is another possible concern with videotaping lethal injections.<sup>170</sup> However, in reality, videotaping lethal injections will reduce costs to the criminal justice system.<sup>171</sup> By creating a record that can more quickly solve factual disputes, prevent meritless claims, and deter misconduct that would give rise to claims in the first place, videotaping lethal injections would reduce the amount of litigation as well as the duration of litigation that does make it to court. Fewer suits being filed means less expenditures and use of court resources.<sup>172</sup> The reduction in cost is not limited to monetary costs or those costs suffered by the litigants.<sup>173</sup> In conducting a cost-benefit analysis, we must also take into account values such as promoting fairness in our criminal procedures, increased public confidence in the criminal system, and the value in obtaining the truth.<sup>174</sup> It is ironic that "if the cost of repairing a car is at stake in a civil case, the defendant's account of the matter (i.e., his deposition) is meticulously recorded, but agencies with ample opportunity and resources to do so fail to record statements where liberty or perhaps even life are at stake."<sup>175</sup> With lethal injections, life is not just "perhaps" at stake, it is exactly what *is* at stake—specifically the dignity of that life and the integrity with which the State ends it. If enormous amounts of time, money, and resources are spent ascertaining what really happened in a dispute over the repair of a car, resources must be used to uncover the truth when the State is taking a life.<sup>176</sup>

## VI. CONCLUSION

"No amount of attention to the means will resolve the debate about the ends of criminal justice . . . We can be certain, however, that if we do not attend closely to the means, the most nobly conceived ends will be futile."<sup>177</sup>

The death penalty is constitutional. This Note does not dispute that. What this Note does advocate is the simple idea that a constitutional end must be achieved by constitutional means. The State has an obligation to comply with

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<sup>170</sup> This includes the cost of recording equipment and personnel such as the cameraperson and the law enforcement official that must accompany him.

<sup>171</sup> Recording is not only feasible but will have an overall benefit to the criminal justice system. See LEO, *supra* note 35, at 296.

<sup>172</sup> Opponents who claim that front-end costs of videotaping are too much should realize that the funds "will be repaid many times over by the savings in the time and resources" of the court and the parties. *Id.* at 302.

<sup>173</sup> *Id.* at 303 ("Any cost-benefit analysis of recording must take into account the costs and benefits to the entire criminal justice system, not just to police.").

<sup>174</sup> This is analogous to the non-monetary benefits that videotaping custodial interrogations bring, namely greater accuracy of prosecutorial charging decisions, judicial rulings, and jury verdicts. *Id.* at 304.

<sup>175</sup> Sullivan, *supra* note 74, at 38 (quoting District Court Judge Stephen Friot).

<sup>176</sup> *Id.* This is especially important because the government is taking a life in the name of society. After all, criminal cases are titled *People v. X*.

<sup>177</sup> LEO, *supra* note 35, at 318 (quoting Lloyd Weinreb).



the Constitution when executing its inmates, and to enforce that obligation through litigation, objective evidence must be made available. Videotaping lethal injections will create the necessary objective evidentiary record that litigants can use to challenge or defend the constitutionality of or adherence to a state's lethal injection procedure. This record will benefit both inmates and the State by promoting truth-finding, serving as a check on the State, and deterring meritless claims. The proposed court rule allows for the creation of an objective record while protecting the inmate's privacy. Videotaping lethal injections will sweep aside the veil of secrecy and ensure that lethal injections are conducted properly and constitutionally, thereby increasing the credibility of our justice system and the people's confidence in it. Because, after all, if the government is going to do something, then it should do it right.

APPENDIX: PROPOSED RULE MANDATING THE VIDEOTAPING OF LETHAL  
INJECTIONS

- (a) Purpose: to create an objective evidentiary record to be used by litigants in challenging or defending the State's lethal injection protocols.
- (b) Definitions:
  - (1) Recording: any form of videotape, motion picture, or visual digital recording.
  - (2) Lethal Injection Protocol: the lethal injection protocol currently employed by the State.
  - (3) Videotaping: the process of making a Recording of the execution of a death sentence.
  - (4) Inmate: the individual to be executed.
- (c) Application: The provisions of this Rule shall apply to all lethal injections in the State, subject to the following conditions:
  - (1) The Process of Recording
    - (A) Consent
      - (i) The judge must obtain the knowing and voluntary consent of the Inmate before Videotaping may be permitted. The consent must be given:
        - (a) Orally;
        - (b) In court before the judge; and
        - (c) In written form, signed before the judge.
      - (ii) The Inmate must be informed of the purpose behind the Recording and who will be permitted to view it.
      - (iii) If the Inmate revokes consent at any point prior to the beginning of the Videotaping, the Videotaping cannot be conducted.
    - (B) Conducting the Videotaping
      - (i) The Videotaping must be conducted by one court-appointed, impartial cameraperson, accompanied by a law enforcement official who will ensure that no tampering occurs.
      - (ii) The cameraperson should have the proper qualifications, expertise, and technical experience, and be trained on how to record the lethal injection, including but not limited to the angle from which the lethal injection should be recorded and how the equipment will be used around the execution chamber.

[Continued from previous page]

- (iii) The cameraperson must test the equipment on the day of the execution.
- (iv) The cameraperson must be present for the entirety of the execution.
- (v) The same one or two camerapersons must be used by this court for every lethal injection that is recorded in order to ensure consistency.

(C) Duration of the Recording

The Videotaping must begin right before anyone enters the execution chamber for the first time, including when personnel enter without the Inmate to make any preparations, and continue until the Inmate's body is removed from the chamber.

(D) Delivering the Recording

The cameraperson and law enforcement official must deliver the Recording to the court immediately following the Videotaping to prevent tampering.

(2) Procedure for Obtaining the Recording for Use as Evidence

(A) Motion to Record

- (i) The party wishing to view the Recording and use it as evidence must request the Recording by motion.
- (ii) The party must allege facts sufficient to suggest a reasonable possibility that the Recording will show a violation that the party seeks to prove.
- (iii) The motion can be made at any time pre-trial or during the trial—whenever the evidence becomes necessary to obtain.

- (B) If one party views the Recording, the other party must be permitted to do so as well.

(3) Individuals Permitted to View the Recording

(A) The Recording may only be viewed by the following individuals:

- (i) Attorneys for the party challenging the procedure;
- (ii) Attorneys for the State;
- (iii) The presiding judge;
- (iv) Expert witnesses who must analyze and testify about the Recording's contents.

[Continued from previous page]

- (B) These individuals may only view the Recording in court in the presence of a law enforcement official to prevent any tampering.
- (C) The Recording may never leave the court.
- (D) All those who view the Recording, including the law enforcement official, must sign a confidentiality document asserting that they will not make a copy of the Recording, discuss the Recording with anyone other than those who have been permitted to view it, or modify the Recording in any way.
- (E) No duplicates of the Recording may be made.
- (F) Upon conclusion of the trial, the Recording should be sealed by the court and forbidden to be seen by anyone unless a Motion to Record is granted in subsequent litigation.



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